The Application of International Human Rights Law in State Courts: A View From California*

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I. Introduction

My remarks will focus on the use of international human rights law in what I consider to be the manner most likely to be accepted by California's judges; namely, to provide specific content to broad norms such as equal protection or due process of law.[1] I believe that international human rights law is most appropriately used in this context—both by the judge seeking assistance in defining such broadly phrased constitutional norms and by the litigator trying to convince a court to broaden the scope of human rights in a given case.

My intent is to propose some answers to one of the most formidable questions that litigators intending to argue the applicability of human rights law in a particular case must face; that is, what to reply when the law and motion or trial judge asks, "Why should I apply international human rights law, which I can't even Shepardize and which I have trouble finding, in a lawsuit involving Californians and issues of California law?" I will also suggest that it is worthwhile for litigators to force judges to ask this question in appropriate cases.

The question is not an unreasonable one for a judge to ask. I have tried to come up with some reasonable answers that are specific and that will enable the litigators among you to stand in front of a judge, with some degree of confidence, and make arguments that will be treated seriously and, perhaps, even adopted by the court.

II. Preliminary Points

Before I get to those arguments I will make a few preliminary points. First, while my talk focuses on the use of international human rights law by

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[1]These remarks pertain directly to California Law; however, the independent vitality and meaning of state constitutions is by no means limited to California. *See generally Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

litigators, it is a mistake to think that courts are the only place where international human rights law can be used, or that lawyers are the only people who can use it profitably. It would be wrong to leave human rights only to the lawyers. International human rights law should also be used by lobbyists and legislators, in the legislative process and by citizens in demanding of their elected representatives laws which reflect the evolving body of international human rights law.

Second, I do not believe that it is critical for practitioners to be overly concerned about the precise legal status of the international norms they present to a California court. When I use the phrase "international human rights law" I am referring to more than the International Bill of Human Rights (which is composed of the Universal Declaration of Human Rights,[2] the International Covenant on Civil and Political Rights,[3] the International Covenant on Economic, Social and Cultural Rights,[4] and the Optional Protocol to the International Covenant on Civil and Political Rights[5]).

I am also including a wide range of treaties, whether ratified or unratified by the U.S., whether self-executing or non-self-executing,[6] whether or not the norms they articulate are part of customary international law. For instance, included in my definition are the Standard Minimum Rules for the Treatment of Prisoners—rules which may or may not be part of customary law.[7]

When using international human rights law to provide content to our California law, the juridical status of the instruments used is not as important, nor are the complexities of application as great, as when the instruments are sought to be applied directly as binding law. A treaty ratified by the U.S. may be more persuasive than an unratified treaty; a declaration passed unanimously by the U.N. General Assembly decades ago, and regularly reaffirmed, may be more persuasive than a declaration recently passed by the U.N. Economic and Social Council. A provision widely recognized to be part of customary international law may be more persuasive than a provision that is not. However, these differences are of degree rather than kind when a court looks to international human rights norms as interpretive aids.

The final preliminary point is that there is good reason to go through the effort necessary to learn about international human rights law, which is undeniably a complex and unfamiliar area of law to most practitioners and

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[2]G.A. Res 217A, U.N. Doc. A/810 at 71 (1948).

[3]G.A. Res 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

[4]G.A. Res 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967).

[5]G.A. Res 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1967).

[6]*See* discussion of Connie de la Vega, *infra*. *See also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

[7]First U.N. Congress on the Prevention of Crime and the Treatment of Offenders Annex I.A. at 67, U.N. Doc. A/CONF/6/1 (1955).

even scholars. There are two questions to which the practitioner will want answers before embarking on this course of study. One is, does this law really help in a practical and strategic sense? That is, are there more and broader rights described in international human rights law than in California law? The next question is, assuming that international human rights law does create additional rights, is it worthwhile to use that law if it may be used only as an interpretive device rather than as binding law?

III. The Value of Human Rights Law as an Interpretive Device

In my view, having an interpretive device that the court actually uses is almost as valuable as having law that the court says is binding on it. The end result in many cases, for practical purposes, is the same. If a court uses human rights law to reach a decision in your favor, it doesn't matter very much what the legal status of the international norm is.

Another advantage of using human rights law as an interpretive device rather than arguing that it is binding on the state court as treaty or customary law is that a California decision which adopts a human rights norm to interpret California law cannot be reviewed by the U.S. Supreme Court; it is insulated from Supreme Court review because there is an "independent state ground" for the decision. If, however, a California court adopts international human rights law as a matter of treaty or customary law, then a federal issue may be created. Litigators, particularly in California, may wish to avoid that result, even to the point of using law that arguably has treaty or customary law status merely for its interpretive value.

IV. Rights Recognized by International Law v. Rights Recognized by California Law: Greater Protections?

Equal protection is one area where international human rights law may be stronger than California law. Undeniably the California Supreme Court has taken a much broader view of our equal protection clause (article 1, section 7 of the California Constitution) than the U.S. Supreme Court has taken of the equal protection clauses in the Fifth and Fourteenth Amendments.[8] The Unruh Civil Rights Act[9] provides additional protection to California residents. Despite California's good record, many equal protection arguments could be strengthened by use of international human rights law to interpret California law, in particular the California Constitution and the Unruh Civil Rights Act.

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[8] *Compare* Serrano v. Priest, 18 Cal. 3d 728 (1976) *with* San Antonio Ind. School District v. Rodriquez, 411 U.S. 1 (1973). *See also* Sail 'Er Inn v. Kirby, 5 Cal. 3d 1 (1971) (sex is a suspect class) and Gay Law Students' Association v. Pacific Tel. and Tel., 24 Cal. 3d 458 (1979) (discrimination against homosexuals given a higher level of scrutiny than required under federal law).

[9] CAL. CIV. CODE § 51 (1974).

Of all the norms in international human rights law, the norm against discrimination is among the strongest. For example, article 2, section 2 of the International Covenant on Economic, Social and Cultural Rights provides that:

> The state parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[10]

A significant feature of that section is that it prohibits discrimination based on *any* status, not just the statuses recognized as suspect by the U.S. and California Supreme Courts. Accordingly, litigators may be able to use human rights law to make arguments for additional suspect classifications or additional fundamental interests that have not yet been recognized as such even by the California Supreme Court. For instance, the disabled could be viewed as a suspect class, using international standards, in light of the international human rights norms that have been articulated since the mid-1970s, particularly in connection with the 1981 International Year of the Disabled.[11]

Affirmative action is another area where the California Supreme Court has gone beyond the U.S. courts.[12] It is also an area where international human rights law provides broader protections in that it may actually require the taking of positive steps to eliminate discrimination under certain circumstances.[13] Further, human rights law reaches government actions that have discriminatory effects without requiring discriminatory intent.[14]

Human rights law can also play a role in the area of prisoners' rights. In California, Penal Code sections 2600 and 2601 govern the rights of prisoners, both pre- and post-conviction.[15] Section 2600 provides that a prisoner's rights may be limited only to the extent "necessary in order to provide for the reasonable security of the institution in which he is confined and for the protection of the public." For example, in March, 1983, Judge Hupp of the Los Angeles Superior Court, in an ACLU case, *Youngblood v. Gates*,[16] held that the *De Lancie* standards apply to treatment of pre-trial detainees in L.A. city jails; he refused to follow the more restrictive standards articu-

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[10] *See* note 4, *supra*.

[11] *See* Report of the Advisory Com. for the Int'l Year of Disabled Persons (7 Oct. 1981) U.N. Doc. No. A/36/471/Add. 1.

[12] *See, e.g.,* Price v. Sacramento Civil Service Commission, 17 Cal. 3d 234 (1978).

[13] *See, e.g.*, The International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), 660 V.N.T.S. 195, opened for signature March 7, 1966, entered into force January 4, 1969, art. 1(4), 2(1)(c)(d), 2(2) and 5.

[14] *Id.*, art. 1(1).

[15] De Lancie v. Superior Court, 31 Cal. 3d 865 (1982).

[16] L.A.S.C. Nos. C203, 343 and C344, 693 (appeal pending).

lated by the U.S. Supreme Court in *Bell v. Wolfish*[17] and *Rhodes v. Chapman*.[18] The U.N.'s Standard Minimum Rules may be cited in such cases to give content to Penal Code section 2600 just as they were cited by Justice Linde in *Sterling v. Cupp*[19] and by Judge Cabranes in *Lareau v. Manson*[20] to assist in the interpretation of Oregon and Connecticut statutes, respectively.

In short, there are several areas where international human rights law, at least arguably, provides broader protections than California law. There are always new battles to be fought and international human rights law may profitably be pressed into service.

There also are other areas in which international law is not as good as California law. For instance, the rights of criminal defendants under California law are as good or better than those recognized by international law. In using international norms only to illuminate domestic standards, there is no problem in such cases because in all cases the U.S. and state constitutions define minimum standards; international norms may be invoked only in so far as they equal or surpass domestic standards.

V. Why Should a California Judge Invoke International Human Rights Law?

Returning to my primary question, what to say to a skeptical law-and-motion or trial judge, I offer the following arguments. First, California has been aboard the *Paqueta Habana*[21] ever since it became a state. In other words, since 1855, California courts have recognized that international law, the law of nations, is part of California law and binding on California judges, and is to be used where applicable to interpret the rights and obligations of litigants.[22] California courts have continued to cite international sources in a variety of cases. For instance, in *People v. Anderson*[23] the California Supreme Court referred to international documents and practices in finding that the California death penalty statutes, as then written, offended evolving standards of decency shared by civilized nations and therefore constituted cruel and unusual punishment under the California Constitution. Justice Newman cited international human rights law as additional

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[17]441 U.S. 520 (1979).

[18]452 U.S. 337 (1981).

[19]29 Or. 611, 625 P.2d 123 (1981).

[20]507 F. Supp. 1177 (D. Conn. 1980), *modified on different grounds*, 651 F.2d 96 (2d Cir. 1981).

[21]*The Paquete Habana*, 175 U.S. 677, 700 (1900).

[22]*See* Teschemacher v. Thompson, 18 Cal. 11 (1861). One cannot, of course, ignore the obstacle posed by the California Supreme Court's decision in Sei Fujii v. State, 38 Cal. 2d 713 (1952), in this account. However, *Sei Fujii* does not prevent a California court from looking to international human rights law to assist in the interpretation of California law.

[23]6 Cal. 3d 628 (1972).

support for his positions in at least seven opinions.[24] This use of international law demonstrates that the issues and concepts of human rights law are not unfamiliar to California courts.

Second, California courts have the authority to interpret the state constitution and laws of California independently of decisions of the U.S. Supreme Court and the actions of Congress or the federal executive. Article I, section 24 of the California Constitution sets forth plainly the independent vitality of the California Constitution. Accordingly, California judges do not have to wait until the Senate decides to ratify a treaty or until the federal judiciary recognizes an international norm as part of customary law; they presently have full authority to invoke international human rights norms in interpreting California law.

Third, the conception of human rights articulated by the California Supreme Court is closer, in many respects, to the norms embodied in international human rights law than to the view of rights held by the present U.S. Supreme Court. California courts routinely look to federal courts for guidance in interpreting provisions of the California Constitution. Why shouldn't they, in addition, look to international human rights law?

Fourth, I would point out that the U.S. has participated actively in the creation of international human rights law over the last four decades, from the U.N. Charter to the Universal Declaration, to the dozens of human rights treaties, and to the even greater number of declarations and other instruments that comprise the broad body of international human rights law. A California judge, inclined to invoke human rights law, should not in any way feel constrained by any notion that she or he is interfering with the White House's assumption as to what international human rights law should be. It is one thing to urge that the State Department, the executive branch generally, or the Congress, out of deference to state autonomy, should not impose obligations on state courts as a matter of binding treaty law. It would be an altogether different and unreasonable position for the federal government to object to a state court's decision to follow international human rights law on its own initiative. Neither federalism nor states' rights are jeopardized by such initiative.

Fifth, state courts traditionally have been the courts that have fashioned fundamental rights. Only during the period of the Warren court were U.S. courts predominant in the creation of human rights standards. Interestingly, however, many of the Warren court decisions were preceded by deci-

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[24] People v. Levins, 22 Cal. 3d 620, 625 (1978) (conc. opinion); Cramer v. Tyars, 23 Cal. 3d 131 (1979) (dis. opinion); City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130 n.2 (1980) (Maj. opinion); People v. Privatera, 23 Cal. 3d 697 (1979); *Conservatorship of Hofferber*, 28 Cal. 3d 161, 172 n.9 (1980) (maj. opinion); People v. Mimirani, 30 Cal. 3d 375, 388 n.1, (1981); American National Ins. Co. v. Fair Employment & Housing Comm., 32 Cal. 3d 603, 608 nn.4, 5 (1982) (maj. opinion).

sions of state courts, notably the California Supreme Court, that paved the way for the federal decisions. There is absolutely no reason why California should not similarly lead the way in the use of international human rights law.

Sixth and finally, California courts are agents of the developing international legal order. Undoubtedly there is a way of phrasing this argument that does not appear to accuse a judge of subversive activities in furtherance of an international plan of which she or he is wholly unaware. One way or another, I do believe that state judges can be convinced that it is appropriate for them to play a role in the implementation of international human rights law. The international legal system is not structured like our own system; there is no supreme tribunal to interpret and apply international human rights law. All courts, including state courts, are competent to interpret international human rights law and each state court proceeding in which human rights law is used, even as an interpretive device, contributes to the growth and strengthening of human rights norms.

Customary international law has been held to be part of our common law[25] and is similarly regarded by courts in most nations that have a common law tradition. International norms, whether regarding human rights or any other subject of international law, may ripen into customary law in part by being used and cited by courts. All courts—appellate and trial, federal and state, national and international—are competent to participate in the evolution of international human rights law. To the extent they do so, courts may contribute to the growing respect paid to international human rights norms in our own country and, through our example, around the world.

The international documents embodying human rights law, like our federal and state constitutions, are grand and potentially powerful instruments in the hands of those with the courage, knowledge and willingness to use them. That is the task that faces us. We will prevail only if we begin to appeal to judges to share that vision.

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[25] *The Paquete Habana*, *supra* n.20, 197 U.S. at 700; Filartiga v. Pena-Irala, 630 F.2d 876 (1980); *See also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 221-23 (1972).